NO. 48619-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

GERALD LEE CAMERON JR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01143-0

BRIEF OF RESPONDENT

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I. **Cameron's right to a fair trial was not violated when the trial court allowed a State's witness to testify that Cameron threatened to kill her the day after the complaining witness claimed Cameron threatened to kill him.**

II. **The State is not seeking costs related to this appeal.**

STATEMENT OF THE CASE

The State accepts Cameron's statement of the case, with one exception, and adds additional facts where necessary in the argument section below.[1]

ARGUMENT

I. **Cameron's right to a fair trial was not violated when the trial court allowed a State's witness to testify that Cameron threatened to kill her the day after the complaining witness claimed Cameron threatened to kill him.**

Cameron assigns error to what he erroneously believes was a trial court ruling admitting evidence that Cameron threatened to kill his former girlfriend, Ms. Lentz, during his assault on her following his assault on the victim in this case, Mr. Somerville. Cameron's claim should be rejected.

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[1] In his brief, Cameron includes alleged facts about him shopping with Ms. Lentz, his girlfriend at the time, for wedding rings and asking Ms. Lentz to marry him. Brief of Appellant at 3. These alleged facts were not presented to the jury. Rather, they were placed into the record during an offer of proof by defense counsel. They are not properly a part of the Statement of the Case where they were not admitted to the jury and where error is not assigned to the trial court's decision not to admit them.

Cameron complains that the trial court, following argument on a motion in limine, specifically ruled that Ms. Lentz would be permitted to testify that the defendant threatened her during the assault he committed against her several hours after assaulting the victim. This is a misrepresentation of the record.

Prior to trial, the trial court was asked to rule on whether Ms. Lentz would be able to testify that several hours after the defendant assaulted Mr. Somerville, he assaulted and raped her in their shared tent. The purpose of this testimony, as identified by the State and found by the court, was to rebut the defendant's statement to the police that he received all of his injuries (including scratches on his chest and a bloody scratch on his ear) during the altercation with Mr. Somerville when, in fact, the scratches on his chest (and possibly on his ear) were sustained while he assaulted and raped Ms. Lentz. The testimony of Ms. Lentz regarding her assault at the hands of the defendant was being offered, in other words, to rebut the defendant's claim of self-defense. The trial court, after hearing argument, ruled that Ms. Lentz could testify that she was assaulted by the defendant but could not testify about being raped by the defendant, because that testimony would be overly prejudicial and was unnecessary to effectively rebut the self-defense claim.

The trial court was not, however, asked to rule on the admissibility of a threat to kill, presumably because the lawyers were unaware of it. During the re-direct examination of Ms. Lentz, the prosecutor asked Ms. Lentz whether, during the defendant's assault on her in the tent, the defendant told her "not to tell the police about this." RP 262. She replied "Yes, he did." RP 263. The prosecutor said "Okay." Id. Then, totally unsolicited and spontaneous, Ms. Lentz said "He said because if I did, he would kill me." Id. Defense counsel objected to this remark on the ground that it was in response to a leading question. Id. The court overruled the objection. Id. This exchange in which Ms. Lentz spontaneously and unresponsively testified that the defendant threatened to kill her was entirely separate from the evidentiary issue the trial court resolved during the motion in limine regarding the admissibility of the assault on Ms. Lentz as an alternative explanation for the defendant's injuries.

Because Cameron's objection to this testimony was on the basis of the prosecutor having elicited it (which he didn't) as a result of a leading question, his current claim of trial court error in "admitting" the testimony is both incorrect and unpreserved. Had counsel lodged a different objection, such as that the testimony was unresponsive, or violated a particular evidence rule, the trial court could have ruled upon that objection and considered whether a curative instruction would cure the

problem. Because trial counsel did not lodge such an objection, the argument he makes in this appeal is waived because it was not preserved below by an objection.

RAP 2.5(a) disallows a party from raising an issue for the first time on appeal unless the claimed error is one of constitutional magnitude.

> It has long been the law in Washington that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a); *State v. Lyskoski*, 47 Wn.2d 102, 108, 287 P.2d 114 (1955). The underlying policy of the rule is to "encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter. See *City of Seattle v. Harclaon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960).

State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).

Cameron did not object at trial to the testimony he now complains of on the same basis he now argues. RAP 2.5(a)(3) permits review of constitutional claims that are raised for the first time on appeal if they involve a question of manifest constitutional magnitude. RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988). In this case, Cameron has not shown that the brief remark in question is of constitutional magnitude, beyond merely assuming it be true. The

appellate court will not assume an error is of constitutional magnitude. *State v. O'Hara*, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). Rather, the appellant must identify the constitutional error. *Id.* At 98. Here, Cameron generally states that the trial court "denied him a fair trial" and cites boilerplate language about the right to due process. But the remainder of his argument on this assignment of error is that the court committed an *evidentiary* error. This is insufficient to constitutionalize this claim.

Even if Ms. Lentz's remark did involve a constitutional error, our Supreme Court has rejected the argument that all claimed trial errors which implicate a constitutional right may be reviewable under RAP 2.5(a)(3), noting that "[t]he exception actually is a narrow one, affording review only of 'certain constitutional questions.'" *Id.* at 687 (citing to Comment (a), RAP 2.5, 86 Wn.2d 1152 (1976)). The term "manifest" in this situation requires a showing of actual prejudice. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). Exceptions to RAP 2.5(a) should be construed narrowly, and to prevail the defendant must show that the claimed error had identifiable consequences in the trial of his case. *State v. WWJ Corp*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). By not objecting on the ground he now bases his argument, Cameron deprived the trial court of the opportunity to address the claimed error or to cure it.

A reviewing court should first satisfy itself that the alleged error is truly of constitutional magnitude and then if it is, should examine the effect the error had on the defendant's trial according to the harmless error standard set forth in *Chapman v. California*, 386 U.S. 18, 17 L. Ed.2d 705, 87 S. Ct. 824 (1967). *State v. Scott*, *supra*, at 689.

Here, Cameron has not demonstrated prejudice. A review of Ms. Lentz's testimony shows that it was riddled with hyperbole. She testified to "having been raped all my life," a statement that was unresponsive to the question asked. RP 244. She testified to having "only half a brain." RP 245. Ms. Lentz's hyperbole throughout her testimony served to undercut her brief remark about Cameron threatening to kill her if she talked to the police. In addition to the hyperbole, Ms. Lentz testified about Cameron having assaulted her—testimony which was ruled admissible by the court and which is not challenged in this appeal. Ms. Lentz's remark about Cameron threatening her could hardly have been more prejudicial than the jury hearing that Cameron assaulted her and told her not to talk to the police about what happened. Finally, Ms. Lentz testified, without objection and in response to a question from defense counsel, that Cameron is a man who doesn't take "no" for an answer—a remark that paints Cameron in a very poor, possibly violent, light. RP 254. Ms. Lentz's remark about Cameron threatening her was no more prejudicial

than her testimony about the assault, her testimony about him telling her not to talk to the police, and her testimony about Cameron refusing to take "no" for an answer. It could also have been viewed as hyperbole, given her other dramatic statements.

Cameron bears the burden of showing prejudice as a pre-condition to this Court reviewing this claim for the first time on appeal. Cameron fails to make the required showing. This Court should decline to review this claim. And should this Court decide to review this claim, the testimony complained of was harmless for the reasons set forth above.

> "Where the error is not of constitutional magnitude, we apply the rule that 'error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (emphasis added) (quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)). Under this nonconstitutional harmless error standard, "an accused cannot avail himself of error as a ground for reversal unless it has been prejudicial." *Cunningham*, 93 Wn.2d at 831, 613 P.2d 1139. In assessing whether the error was harmless, we must measure the admissible evidence of the defendant's guilt against the prejudice, if any, caused by the inadmissible evidence. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

State v. Barry, 183 Wn.2d 297, 303, 352 P.3d 161 (2015).

The error, if any occurred, was harmless. The State respectfully asks this Court to affirm Cameron's conviction.

II. The State is not seeking costs related to this appeal.

The State has no intention of filing a cost bill in this case. The Clark County Prosecutor almost never seeks a cost bill in direct appeals, going back many years before *State v. Sinclair* was even decided. 192 Wn.App. 380, 367 P.3d 612 (2016). In the rare instance a cost bill is sought in a direct appeal, it is only in instances where the record clearly shows an ability to pay such a bill in the future. Mr. Cameron was homeless at the time of this assault. A cost bill would be inappropriate.

CONCLUSION

The trial court should be affirmed in all respects.

DATED this 21 day of October, 2016.

Respectfully submitted:

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October 21, 2016 - 3:15 PM

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